FILED
JUN 2 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1481

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,
Petitioners,

vs.

BERNARD SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, AND INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 1,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF PETITIONERS.

JERRY KRONENBERG,
111 West Washington Street,
Suite 2144,
Chicago, Illinois 60602,
Attorney for Petitioners.

Of Counsel:
JOHN W. PELINO,
22nd Floor, Architects Building,
17th and Sansom Streets,
Philadelphia, Pennsylvania 19103.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 1481

TERMINAL FREIGHT COOPERATIVE ASSOCIATION AND TERMINAL FREIGHT HANDLING CO.,
Petitioners,

vs.

BERNARD SAMOFF, REGIONAL DIRECTOR OF THE FOURTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, AND INTERNATIONAL ASSOCIATION OF MACHINISTS, DISTRICT LODGE NO. 1,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF OF PETITIONERS.

In opposing the instant Petition for Writ of Certiorari, the Regional Director relies on the argument that this case is not an "appropriate" vehicle in which to review the issues presented, since the underlying dispute which gave rise to those issues was allegedly settled during the course

of the litigation below.[1] The Regional Director does not, however, expressly contend either that the case is moot or that a decision on the merits would fail to benefit these and all prospective charging parties before the National Labor Relations Board.

The Regional Director's Opposition does contain three misleading and incorrect implications in support of its conclusion that this case is not "appropriate" for review, which warrant response:

(1) *The underlying case which gave rise to the instant Petition is, for all practical purposes, settled and ended.*

This assertion is premised on the Director's view that ". . . the underlying Board proceeding will, in all probability, shortly be closed, since an informal settlement agreement has been approved by both the Regional Director and the General Counsel", and that the Board had dismissed the charging parties' subsequent appeal of the General Counsel's decision. (Opp., p. 3)

In fact, and contrary to the Director's view, the underlying case is still in active litigation. On May 15, 1970, the charging parties filed a Petition for Review of an Order of the National Labor Relations Board, in the Court of Appeals for the Third Circuit, docketed as Case No. 18,948, in an effort to test the sufficiency of the terms of the Settlement Agreement by which the Director and the Board unilaterally seek to close the underlying case. That Petition for Review is predicated principally upon the propositions, (i) that the Settlement is inadequate in that it fails to

1. In so arguing, the Regional Director misrepresents the scope of the questions presented for review by referring only to the question of the charging parties' right to appellate review of a district court's refusal to grant injunctive relief under Section 10(l) of the National Labor Relations Act. However, this case raises other equally fundamental questions in the interpretation of Section 10(l), involving the nature and extent of charging parties' participatory rights in the district court proceedings themselves, to which the Regional Director's opposition is silent. (Pet., p. 3)

provide any remedy against one of the joint perpetrators of the unfair labor practices purportedly remedied in the Settlement and (ii) the charging parties are, at least, entitled to a hearing on their objections to that Settlement as is guaranteed them in *Leeds & Northrup* v. *N. L. R. B.*, 357 F. 2d 527 (CA 3, 1966). Appropriately, the Petition for Review has been filed in the same Circuit as issued *Leeds & Northrup*. Moreover, the Director and the Board have been on notice for over a year of the charging parties' intention to urge, in the Court of Appeals if necessary, the position taken by them in the aforesaid Petition for Review. Thus, that position was articulated to the Director in objecting to the proposed terms of the Settlement on May 23, 1969; it was restated to the General Counsel in appealing the Director's unilateral acceptance of the Settlement on January 22, 1970; it was argued to the Board on April 16, 1970 and May 6, 1970 in an effort to review the General Counsel's refusal to overrule the Director, all but the last of which occurred prior to and independently of the filing of the instant Petition for Writ of Certiorari.

Accordingly, the underlying dispute which gave rise to the injunction proceeding involved herein has not been resolved; the case has not been closed, there has as yet been no compliance by the Union with even the minimal and inadequate provisions of the Settlement,[2] and a favorable result in the Court of Appeals will return the parties to the position they were in before the district court.

(2) *The charging parties were not deprived of any meaningful relief to which they were entitled in the district court.*

---

2. The charging parties have sought on several occasions to secure a stay of the Director's efforts to secure compliance with the terms of the Settlement Agreement pending review of the adequacy of its provisions. Requests for such a stay were made to the Director on May 6, 1970 and to the general counsel on May 11, 1970 and May 28, 1970. The first two requests were denied; no response has as yet been made to the third.

The Director's Opposition implies that the approval by the district court of a Stipulation whereby the Union agreed to cease its unlawful conduct, in lieu of granting injunctive relief, afforded adequate relief to the charging parties notwithstanding the mandatory duty imposed by Section 10(l) that the Director "shall" seek injunctive relief. In fact, the Stipulation, which was approved over the charging parties' objections, was not an adequate substitute for the statutorily-guaranteed right to injunctive relief. Whereas the granting of an injunction after a hearing requested by the charging parties would have the significant deterrent effect of subjecting a violating party to proceedings in contempt, the Stipulation had no such deterrent effect. That Stipulation constituted only an agreement not to engage in secondary boycotts which, if violated, permitted the Board, when and if it was able and disposed, to secure from the district court an *ex parte* restraining order. Such an order, pursuant to the express terms of Section 10(l), would expire after five days. For any further relief, a full hearing is required with notice to and full participatory rights guaranteed to all parties. Thus, the resumption of unlawful boycott activity by the Union would not have subjected it to contempt but would only have entitled it to a full hearing whose conclusion could only have yielded precisely that injunction to which the charging parties had claimed themselves to be entitled from the outset.

Apart from the delays and the absence of genuine deterrent effect inherent in this procedure, the district court's failure to recognize the charging parties' "party" standing under Section 10(l) yielded further damage to their legitimate interests. Pursuant to the Stipulation actually approved by the district court only the Board was empowered to petition the court for relief should the Union resume its unlawful conduct. However, had the district court acknowledged the charging parties' status as

"parties", then those charging parties could have acted unilaterally to bring to the court's attention any subsequent resumption of the unlawful conduct which caused the Board to file for injunctive relief in the first instance and without the delays inherent in the administrative process which traditionally inhibits the Board's ability to move with equivalent dispatch. Similarly, had the district court recognized that status, the charging parties might have effected a continuation of the injunction suit on the court's docket notwithstanding its approval of the Stipulation, as a means for guaranteeing their speedy access to the court should the Stipulation be violated and should the Board be unwilling or unable to proceed expeditiously on their behalf.[3]

These respects are illustrative of the injury to the charging parties' interests which resulted from the district court's approval of the Stipulation in lieu of holding a hearing on the pending petition for injunctive relief. Nor are these matters of merely academic interest today, for the Union may at any time resume its picketing of these charging parties pursuant to any current or future dispute with the same primary employer. The fact that a contract was executed between the primary and the Union during the course of the litigation below does not warrant the conclusion that the Union will have no further disputes with that company—as, for example, in the interpretation and enforcement of that contract—and that the Union will not seek once again to apply pressure to the primary by picketing these neutral charging parties. The real possibility of such a resumption, coupled with the inadequacy of the remedy afforded by the Stipulation, evidences the injury to the

3. The very nature of the charging parties' business as well as their significant involvement in the National Defense makes expeditious relief from unlawful picketing and boycotts particularly important. Such a need was explicitly recognized both by the district court below (Pet. App. 7A-10A) and by the Director (Pet. App. 15A-17A).

charging parties which has resulted and does result from the erroneous decisions of the district court which the instant Petition for Writ of Certiorari seeks to review.

(3) *The Instant Case Is Moot.*

The Director's implied suggestion of mootness appears predicated upon the theory that further relief from this Court is unnecessary, rather than on the basis of this Court's holding in *Sears, Roebuck & Co.* v. *Carpet Layers, Local 419* (No. 476, this Term, decided April 27, 1970) that the provisions of Section 10(l) of the Act affirmatively preclude the granting of any relief. Although the Director cites *Sears,* that case is clearly inapposite. In *Sears,* mootness was said to result from the fact that the Board had rendered a "final adjudication" on the merits of the underlying dispute, an act which terminated the right to injunctive relief. Here, there has been no adjudication of the merits by the Board whatever; indeed, the Board has taken the view in its response to the charging parties' appeal of the Director's unilateral acceptance of the Settlement Agreement, that it lacks jurisdiction to review the merits of the Director's (or the General Counsel's) decision. (Opp., p. 3.)[4] Accordingly, this case is not moot by dictate of the statute.

The Director's suggestion of mootness reduces to the apparent contention that the cessation (at least temporarily) of unlawful conduct pursuant to an accommodation reached on the underlying dispute during the course of litigation renders the case moot.

As a proposition of law the Director's contention is incorrect. This Court has repeatedly held that a case does not

4. The charging parties' pending Petition for Review in the Third Circuit seeks to test the Board's alleged lack of jurisdiction to render such a review on the merits. In any event, it is clear that the Board has not rendered the "final adjudication" contemplated by Section 10(l) and upon which the decision in *Sears* is based.

become legally moot when, as in this case, unlawful acts are discontinued during litigation or under the duress of legal process. *NLRB* v. *Mexia Textile Mills, Inc.*, 339 U. S. 563; *Local 1976, United Brotherhood of Carpenters and Joiners, et al.* v. *NLRB*, 357 U. S. 93 (involving, as here, the cessation of an unlawful secondary boycott, the settlement of the underlying substantive dispute, and the execution of a contract, all of which, as here, occurred after the institution of unfair labor practice charges with the Board); and *NLRB* v. *Raytheon Co., et al.*, No. 440, this Term, in which unfair labor practices committed in connection with the holding of a representation election had ceased, compliance with the Board's remedial order had been effected, and a second and valid election had thereafter been conducted. The Board's insistence in *Raytheon* that the case was not moot is inconsistent with the Director's contrary contention here.

No factors have been alleged or exist which should result in a greater insullation of the Union from the consequences of their wrongful conduct herein than existed as to any of the respondents in the cases cited above. Similarly, these charging parties are in no respect less in need of effective protection against a future resumption or recurrence of the Union's unlawful acts than were the charging parties in those cases.

An additional and independent basis for this Court's rejection of the Director's suggestion of mootness here results from the singular nature of cases arising under Section 10(l). Such cases, unlike other disputes arising under the Act, involve interim orders of so short a duration and economic pressures on aggrieved employers of such magnitude that, pursuant to the Director's test for "appropriateness" for review, virtually no case arising under Section 10(l) could be other than moot when it reaches this

Court; either the unlawful acts will have ceased pursuant to the employer's capitulation; or the employer will have agreed to some settlement in order to return to full operation; or, for those employers who resist the economic pressures inherent in boycott activity, the Board will have rendered a "final adjudication"; or, as here, the Director will accept a compromise Settlement Agreement over the charging parties' objections resulting in a cessation of the unlawful conduct.

The Director's apparent contention that each of these cases is or would be "inappropriate" for review renders the Board and its agents, rather than the courts, the ultimate arbiter of Congress' intention in enacting Section 10(l).[5] No basis has been suggested to support such a view.

On the contrary, this Court has refused to permit such a limitation on the right to judicial review. *Southern Pacific Terminal Company* v. *Interstate Commerce Commission, et al.*, 219 U. S. 498; *Moore* v. *Ogilvie*, 394 U. S. 814 (cf. Pet., pp. 22-3).

This Court is urged in the instant proceeding to adhere to the principles of these cases whose wisdom was recently summarized as follows:

> "[M]ootness should never perpetually frustrate 'the vital importance of keeping open avenues of judicial review.' If the court is confronted with a substantial likelihood that an issue it believes moot will always arrive there in the same condition because of the inherent nature of the issue, the Court should not refuse review on the basis of mootness. . . . [T]he real choice is not between taking or not taking risks with the qual-

5. Moreover, under this view the Board is empowered unilaterally to determine whether any dispute arising under Section 10(l) may be reviewed merely by withholding or by expediting its "final adjudication" of the merits of the underlying dispute.

ity of the judicial process, but between securing or not securing the values of appellate review—stability, uniformity, and objectivity.'"[6]

Respectfully submitted,

JERRY KRONENBERG,
111 West Washington Street,
Suite 2144,
Chicago, Illinois 60602,
Attorney for Petitioners.

Of Counsel:
JOHN W. PELINO,
22nd Floor, Architects Building,
17th and Sansom Streets,
Philadelphia, Pennsylvania 19103.

6. Note, *Mootness on Appeal in the Supreme Court*, 83 Harv. L. Rev. 1672, 1692 (1970).

CERTIORARI DENIED